IN THE SUPREME COURT OF THE STATE OF MISSOURI

CENTRAL TRUST & INVESTMENT COMPANY,	)	
Appellant,	)	
vs.	)	**Case No. SC93182**
SIGNALPOINT ASSET MANAGEMENT, LLC,	)	
Respondent, and	)	
TROY KENNEDY and ITI FINANCIAL MANAGEMENT, LLC,	)	
Defendants.	)	

Appeal from the Circuit Court of Greene County, Missouri
On transfer from the Missouri Court of Appeals Southern District
Case No. SD31658

SUBSTITUTE BRIEF OF AMICUS CURIAE MISSOURI BANKERS ASSOCIATION, INCORPORATED

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INTEREST OF AMICUS CURIAE

Proposed *amicus* is a Missouri non-profit corporation established as a trade association to promote the general welfare and usefulness of banks and banking institutions. Missouri Banker's Association ("MBA") represents more than 300 commercial banks and savings and loan institutions with over two thousand locations in Missouri and employing over thirty thousand Missouri residents.

Proposed *amicus* has an interest in the issues raised by Plaintiffs' appeal. Specifically, *amicus* has an interest in:

(1) Protecting the confidentiality of information provided by Missouri residents to banks and other financial institutions;

(2) Protecting a major "asset" of banks and other financial institutions created by their industry and good service – customer lists and contact information;

(3) Facilitating compliance by Missouri banks with banking laws, including financial privacy laws; and

(4) Assuring that financial services providers subject to the same financial privacy laws as Missouri banks do not obtain an unfair competitive advantage by fostering the violation of financial privacy laws by individuals or entities that are employed or supervised by those financial service providers.

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment entered by the Circuit Court of Greene County, Missouri, the Honorable Michael Cordinnier presiding, of July 26, 2011, granting summary judgment for Defendants Troy Kennedy, ITI Financial Management, L.L.C., and Signalpoint Asset Management, L.L.C. Plaintiff-Appellant timely filed its Notice of Appeal on October 14, 2011. This Court granted transfer after the issuance of the Missouri Court of Appeals, Southern District Opinion, affirming the trial court's judgment, and this Court has jurisdiction pursuant to Missouri Supreme Court Rules 83.04, 83.09 and Article V, § 10 of the Missouri Constitution.

Proposed *amicus curiae*, Missouri Bankers Association, Incorporated ("MBA"), pursuant to Rule 84.06, conditionally files this brief with MBA's Motion for Leave to File *Amicus Curiae*.

STATEMENT OF FACTS

Proposed *amicus curiae* adopts the Statement of Facts of Appellant Central Trust & Investment Company.

POINTS RELIED ON

1. The Court of Appeals decision erroneously interprets the Missouri Uniform Trade Secrets Act (§417.450 RSMo, *et seq*. (1995)) as it applies to customer names and information maintained by banks and other financial institutions in that the Court of Appeals, in its application of the statutory definition of a "trade secret" under the Missouri Uniform Trade Secrets Act and its application of case law interpreting the Act, fails to take into account state and federal privacy and banking laws and regulations that: (1) apply to the customer names and information at issue in the case; and (2) impose legal duties on all parties in the case.

Coffman Group, LLC v. Sweeny, 219 S.W.3d 763 (Mo. App. E.D. 1999)

Missouri Right to Financial Privacy Act, § 408,675, *et seq.* RSMo (1989)

Missouri Uniform Trade Secrets Act, § 417.450 RSMo, *et seq.* (1995)

Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2010)

2. The Court of Appeals decision erroneously applies this Court's ruling in *Western Blue Print Company, LLC v. Roberts*, 367 S.W.3d 7 (Mo. banc 2012) in that *Western Blue Print Company* does not hold that a non-competition agreement is required for information to be a "trade secret" protectable under the Missouri Uniform Trade Secrets Act.

Western Blue Print Company, LLC v. Roberts, 367 S.W.3d 7 (Mo. banc 2012)

STANDARD OF REVIEW

Where transfer, certification, or certiorari to the Missouri Supreme Court is granted, the Missouri Supreme Court has the authority to make a final determination on the case "the same as on original appeal." Rule 83.09. "The grant of summary judgment is an issue of law that [the Missouri Supreme Court] reviews *de novo*." *Steele v. Shelter Mut. Ins. Co*., 400 S.W.3d 295, 296 (Mo. banc 2013)(citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). "The Court reviews the record in the light most favorable to the party against whom judgment was entered, without deference to the trial court's findings, and accords the non-movant 'the benefit of all Reasonable inferences from the record.'" *Id.*

ARGUMENT

1. The Court of Appeals decision erroneously interprets the Missouri Uniform Trade Secrets Act (§417.450 RSMo, *et seq*. (1995)) as it applies to customer names and information maintained by banks and other financial institutions in that the Court of Appeals, in its application of the statutory definition of a "trade secret" under the Missouri Uniform Trade Secrets Act and its application of case law interpreting the Act, fails to take into account state and federal privacy and banking laws and regulations that: (1) apply to the customer names and information at issue in the case; and (2) impose legal duties on all parties in the case.

Banking is historically, and especially in recent years, one of the most heavily regulated industries in the nation. Despite this fact, the Court of Appeals opinion reads the Missouri Uniform Trade Secrets Act (**§** 417.450 RSMo, *et. seq.*(1995)) in a vacuum, without regard to that regulatory framework. The decision fails to take into account the impact of the ruling on banks required to comply with state and federal laws and regulations, and fails to take into account the impact of such legislation in determining what, under Missouri law, is a "trade secret." Information that might not be a trade secret in a non-banking context could most certainly be a trade secret in the banking context.

The Federal Privacy Rule was enacted as part of the Gramm-Leach-Bliley Act (GLBA) (15 U.S.C. §§ 6801 to 6809 (2010)). Every business entity that is a party in this litigation is a "financial institution" under the GLBA (15 U.S.C. § 6809(3) (1999)) by reason of their financial activities as described in 12 U.S.C. § 1843(k) (2012). The Privacy Rule applicable to those financial institutions requires protection of non-public

personal information from unauthorized disclosure. Non-public personal information includes "…any list, description, or other grouping of consumers…" 15 U.S.C. § 6809(4) (1999). Defendant Signalpoint is a Registered Investment Advisor ("RIA") and is subject to 17 C.F.R. § 248 which requires, *inter alia*, that Signalpoint adopt policies and procedures to "insure the security and confidentiality of customer records and information," and "protect against unauthorized access to or use of customer records or information . . ."[1] Signalpoint also has a duty to supervise Kennedy and ITI because both are "regulatory affiliates" of Signalpoint.

However, both Signalpoint and ITI are "non-affiliate third party(ies)" in relation to the Springfield Trust Company (STC) and Central Trust & Investment Company (CTIC) (15 U.S.C. § 6809(5)(1999)). Therefore, the customer list at issue here could not be lawfully provided to Signalpoint and ITI and Mr. Kennedy without STC's and/or CTIC's cooperation in sending notice to, and obtaining consent from, each of their customers.[2]

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[1] 17 C.F.R. § 248.30(a)(1)-(2).

[2] CTIC received customer complaints regarding the unauthorized marketing and solicitation by ITI and Kennedy. Dep. John R. Courtney, Sr., Exhibit C [37:16-20] p. 60 [Supplemental Legal File]; Dep. Robert E. Jones F [93:5-19] p. 329 [Supplemental Legal File]. CTIC verified that STC had taken appropriate steps to protect client information. *Id*. 310. CTIC placed Signalpoint under express notice that its agent (Kennedy) had obtained unauthorized access and use of CTIC's client names and customer list *Id*. pp. 316, 320, 334[Supplemental Legal File]; 760-761 [Legal File]. Troy Kennedy

All financial institutions are subject to these federal requirements and Signalpoint has a duty to assure compliance with these requirements for itself and its regulatory agents and affiliates – ITI and Mr. Kennedy. Signalpoint is the "employing" firm for both ITI and Mr. Kennedy. The SEC is the prudential regulator for Signalpoint and its regulatory agents and affiliates.[3]

In addition to the federal legislative and regulatory mandates, the state of Missouri has its own set of requirements. All parties to this case are themselves, or are employees of, "financial institutions" governed by the Missouri Right to Financial Privacy Act (§ 408.675 *et seq.* RSMo (1989)). Under the Missouri law, "financial records" are protected. A "financial record" is "an original, a copy, or information derived from any record held

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acknowledged that at one point the bulk of ITI clients (80-85 out of 148) had been obtained from the CTIC/STC customer list. Dep. of Troy Kennedy, Ex. G, [165:2-24] p. 139 [Supplemental Legal File]. All this should have constituted more than mere "red flags" to Signalpoint's Chief Compliance Officer that its agent had obtained unauthorized access to confidential consumer and customer information. Signalpoint did nothing to stop it. Jones Dep., Ex. F [80:2-7] p. 320 [Supplemental Legal File].

[3] CTIC itself and its holding company are enmeshed is yet another layer of responsibility under FDIC banking regulations. Privacy notices are required and the confidential nature of customer lists and information is mandated within 12 C.F.R. § 364.100 - 101 (See also, 12 C.F.R. § 364, Appendix B).

by a financial institution pertaining to a customer's relationship with the financial institution." § 408.675.3(3) RSMo (1989).

The failure to acknowledge this intense regulatory environment makes the Court of Appeals analysis superficial and flawed. For example, the Court of Appeals' suggestion (Opinion, at 10) that affiliate or employee access destroyed the protected status of the customer lists is misguided in the context of a MUTSA case involving financial institutions where all parties with access are within the same strict regulatory environment. Once the state and federal legal obligations of the parties are acknowledged, many of the factual bases[4] for the Court of Appeals' conclusion that the customer lists are not protected become wholly non-persuasive:

1. The fact that Kennedy's employment contract had a list of his clients without a confidentiality proviso is not probative since every person who viewed the contract and the list itself was a person obligated under federal law to protect the contents.

2. The fact that Kennedy might have been able to remember names on the bank's customer list is not probative since Kennedy himself was barred from using the names regardless of how he received them or retained them.

3. The fact that the bank shares its lists with its corporate affiliates is not probative since such sharing occurs within the context of notices and agreements that

[4] Opinion, at 10.

comply with federal law – unlike Signalpoint's and ITI's misappropriation, use and disclosure.

4. The fact that CTIC allowed its employees access to the lists is not probative since all its employees are bound under privacy laws.

Because the Court of Appeals failed to consider the legal obligations of each of the corporate parties in this case under the GLBA and state law, its analysis of the six factor test under *Coffman Group, LLC v. Sweeny,* 219 S.W. 3d 763 (Mo. App. ED 1999)[5] is flawed. Regarding just the 6th factor,[6] the customer lists in our case could *not* be properly (or lawfully) acquired or duplicated by others under the MUTSA, except by strict adherence to the GLBA requirements for notice to customers by CTIC and customer consent for disclosure to a non-affiliated party. Signalpoint itself is required to assure compliance on its own part, and on the part of its agents, Mr. Kennedy and ITI.

Missouri financial services consumers and customers will be adversely affected if the Court of Appeals ruling stands because the ruling allows their names and contact information to be transmitted at will contrary to federal and state privacy laws and regulations. Bank customers, like a physician's patients, rightfully assume the information they provide a bank will be guarded carefully. This is particularly true

[5] Opinion, at 9 - 10.

[6] *Coffman*, at 769 ("Factors to consider in determining whether the information is the holder's trade secret include….(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.")

where, as here, customer names are protected by law. MBA members take this duty to protect customer confidentiality very seriously. Especially today, when the privacy of personal information is constantly under cyber-attack due to the explosion of information technology, products and services, banks must have a legal and judicial environment that allows them to maintain these essential protections. Adoption of the Court of Appeals conclusion would create an environment where financial services' customer information will be at risk to the extent no one would have thought possible.

From a purely business standpoint, a bank's customers are a major asset. The list of customers who have placed their trust in a bank is built with hard work, risk, and good service over decades. Mr. Kennedy admitted that it takes years to develop a customer base,[7] and this asset is "invaluable."[8] To allow any third party to take and use a bank's customer list is tantamount to giving the third party access to the vault. The Court of Appeals decision undermines the substantial efforts and obligations of MBA to preserve and protect this major asset and exposes MBA members to sanctions under the Federal Privacy Rule by allowing other financial service providers unauthorized and improper access to financial services customer lists and customer information.

2. The Court of Appeals decision erroneously applies this Court's ruling in *Western Blue Print Company, LLC v. Roberts*, 367 S.W.3d 7 (Mo. banc 2012) in that *Western Blue Print Company* does <u>not</u> hold that a non-competition agreement is

[7] Depo. of Troy Kennedy, [208: 17-19] p. 654 [Legal File].

[8] Depo. of Troy Kennedy, [213:15-17] p. 659 [Legal File].

required for information to be a "trade secret" protectable under the Missouri Uniform Trade Secrets Act.

In *Western Blue Print Company, L.L.C*, a printing company manager left the company and went to work for a competitor. She then secured a large contract for her new employer from a customer who had been using Western Blue Print Company, LLC. The former employer sued for tortious interference with business expectancy, civil conspiracy and breach of fiduciary duty. This Court stated that "While these 'customer contacts' are protectable, they are not protectable under a theory of confidential relationship or trade secret . . . the proper means for protection is a non-competition agreement." *Western Blue Print Company, L.L.C.*, at 18.[9] The Court of Appeals seizes on this one sentence and concludes that if Kennedy's employment / non-compete agreement is no longer in effect, then the bank's customer lists cannot be "trade secrets" under MUTSA: "In this case, because there was no valid employment agreement in place, no 'proper means of protection' is available." (Opinion at 12-13). The Court of Appeals goes even further:

> Based on the record before us, the customer contact information at issue is not considered to be a trade secret under Missouri law. *Even if it were*, it is clear that customer contacts are only protectable by a non-competition agreement and, in the present matter, Kennedy's non-compete

[9] Quoting *Walter E. Zemitzsch, Inc. v Harrison*, 712 S.W.2d 418 (Mo.App. E.D. 1986).

> agreement was voided by the sale of STC to Central Trust in November 2009.

Opinion, at 13 (citing *Western Blue Print Company, LLC*) (emphasis added).

First, we note that neither *Western Blue Print Company, LLC* nor the case it cites (*Walter E. Zemitzsch, Inc. v Harrison*, 712 S.W.2d 418 (Mo.App. E.D. 1986)) interpreted or applied MUTSA. The law is not cited or discussed in either case. The sentence cited by the Court of Appeals is found within this Court's analysis of what constitutes of breach of fiduciary duty.

Second, neither *Western Blue Print Company, LLC* nor *Walter E. Zemitzsch, Inc*. deal with the heavily regulated world of financial privacy. No party in either case was a financial institution or an individual subject to laws and regulations that are applicable regardless of whether there is a non-compete agreement in place.

Third, the Court of Appeals ends its quotation too quickly. This Court went on to point out that "[the former employee] is not liable for Western Blue's *failure to protect its customer contacts*, especially with clients as vital to its operation as the university and the State of Missouri." *Western Blue Print Company, L.L.C.*, at 18 (emphasis added).Thus, this Court, in its analysis of fiduciary duty, merely stated that a company cannot complain when a former employee (not subject to a confidentiality agreement or non-compete) uses unprotected or loosely protected information after leaving employment. In that factual and legal context this Court's statement to the effect that "you need an agreement to protect these items" is perfectly understandable. In our case, the customer lists were valued, protected and maintained according to strict state and

federal requirements. Even Kennedy admitted the information was treated by Springfield Trust Company as confidential and steps were taken to protect it.[10]

Finally, the Court of Appeals holding suggests that this Court created a new requirement under MUTSA, pursuant to which, in the case of customer lists and information, the provisions of MUTSA itself (specifically those dealing with the basic issue of what is a "trade secret") are negated completely, and the *only factor* to consider is whether there was a non-compete agreement. Simple examination of the Court of Appeals interpretation of the phrase from *Western Blue Print Company, LLC*, exposes that court's faulty logic: "*Even if* [the customer contact information at issue was a trade secret under Missouri law] it is clear that customer contacts are only protectable by a non-competition agreement . . ." (Opinion, at 13). Thus, according to the Court of Appeals, this Court has ruled that the applicability of MUTSA is not determined by the standards set forth in MUTSA at all. Instead, the applicability of MUTSA is determined by whether there is a not-compete agreement. This is a misreading of this Court's ruling in *Western Blue Print Company, LLC.*

CONCLUSION

If the Court of Appeals decision stands, MUTSA and all other state and federal privacy laws and regulations become inapplicable to customer lists and information (or at least become ineffective and confused) in the absence of a non-compete agreement. But

[10] Depo. of Troy Kennedy [223:19 – 224:3] pp. 664-665 [Legal File].

the vast majority of persons with access to confidential, private financial lists are not bound by non-compete agreements. These persons have (correctly) assumed that MUTSA and other laws apply to them, and the lists to which they have access. The Court of Appeals decision injects uncertainty into this critical framework of laws and regulations. By ignoring bank privacy laws, and by completely misstating the holding in *Western Blue Print Company, LLC*, the Court of Appeals has created a new world where fundamental rights of consumers and fundamental responsibilities of financial institutions are no longer clear.

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CERTIFICATE OF COMPLIANCE WITH Rule 84.06
AND CERTIFICATE OF SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, contains the information required by Rule 55.03, and contains 3,393 words as calculated by Microsoft Word 2010 software; and
2. That on the 31st day of July, 2013, a true and accurate copy of the above document was sent via the Court's ECF system to each of the attorneys of record.

/s/ Dale C. Doerhoff
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